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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 567

JO VAN DER LOO, PETITIONER

v.

PAUL A. PORTER, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Emergency Court of Appeals (R. 45–48) has not yet been reported. The Administrator's opinion accompanying the order denying the protest appears at R. 23–27.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on September 5, 1946 (R. 49). The petition for a writ of certio-

rari was filed on October 4, 1946. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act, c. 26, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. V, 924 (d), (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Whether the United States Emergency Court of Appeals, in a proceeding under Section 204 of the Act, is bound by a judgment of a district court interpreting a regulation in an enforcement proceeding involving the same parties.

2. Whether Revised Maximum Price Regulation No. 330, establishing retailer's and wholesaler's prices for women's, girls', children's and toddlers' outerwear garments, was valid prior to the issuance of Amendment No. 5 on April 11, 1946.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, are set out in Appendix A, *infra,* pp. 15–21. R. M. P. R. 330 and Amendment No. 5 appear in the Federal Register (9 F. R. 11350 and 10 F. R. 331, respectively). The pertinent parts of the Regulation and the Statement of Considerations to Amendment No. 5 are set out in Appendix B, *infra,* pp. 22–26.

STATEMENT

This proceeding was instituted by a protest filed by the petitioner, on June 13, 1945, against the provisions of Revised Maximum Price Regulation 330, Appendix, *infra,* pp. 22–24 (R. 1–4). The petitioner protested against those provisions of the Regulation which required her to sell at prices which she had applied to the largest number of delivered garments of the same cost and in the same category during the base period between August 1 to December 31, 1941 (R. 1, 23). She stated that during the base period she found herself with an unbalanced and slowly moving inventory, and that upon expert advice (R. 5, 11), she liquidated her then inventory at greatly reduced prices. She also put damaged, soiled, and faded goods on sale (R. 7–8). "In many instances these sales prices were below the cost prices of the garments". (R. 2.) As a result, her pricing chart, prepared pursuant to the provisions of Revised Maximum Price Regulation 330, contained categories with selling prices which she was required to take as her ceiling prices and "which are either below cost or so slightly above cost as to render the handling of garments in such cost lines unprofitable." (R. 2–3.)

Following the issuance of the Regulation, the petitioner requested of the Office of Price Administration an interpretation of R. M. P. R. 330

(R. 7–8), and, on April 25, 1945, she was advised that, under the Regulation, she was required to continue the markups she had used during the base period without regard to whether they were abnormally low (R. 9–10).

The petitioner's protest was denied by the Administrator on February 12, 1946 (R. 22). While the protest was pending, however, the Administrator filed suit in the District Court of the United States for the District of Columbia, in which he sought an injunction and treble damages against the petitioner, charging her with violations of R. M. P. R. 330. On January 3, 1946, the district court entered judgment enjoining the petitioner from violating the provisions of the Regulation but refused to assess damages against her (R. 31–32).[1] On March 7, 1946, the judgment of the district court was stayed for a period of thirty days from that date to permit the petitioner to file in the Emergency Court of Appeals a complaint against the Price Administrator, objecting to the validity of R. M. P. R. 330. At the same time, the district court issued a temporary injunction effective during the stay. (R. 38–39.)

Petitioner filed her complaint in the Emergency Court of Appeals on March 15, 1946 (R. 31–36), and the Administrator filed his answer on

[1] Appeals from this judgment, by both the Administrator and the petitioner, are pending in the Court of Appeals for the District of Columbia. *Porter* v. *Jo Van Der Loo*, No. 9324; *Jo Van Der Loo* v. *Porter*, No. 9325.

April 8, 1946 (R. 39–41). On September 5, 1946, the Emergency Court of Appeals filed its opinion in which it held that the district court's interpretation of R. M. P. R. 330 was binding on it, and that R. M. P. R. 330, as so interpreted, was valid (R. 45–48). On the same day, judgment was entered dismissing the complaint (R. 49).

ARGUMENT

1. Petitioner's first contention is that the court below did not give proper effect to the decision of this Court in *Collins* v. *Porter,* No. 393, October Term, 1945 (Pet. 3, 17). This Court there held that a protestant was entitled to a decision by the Emergency Court of Appeals on the applicability of a price regulation while a treble damage proceeding was pending in a district court. It did not hold, however, that a protestant was so entitled even after the district court had entered judgment. This is the relief the petitioner now seeks and the opinion of this Court in the *Collins* case makes it perfectly clear that it is not now available. It was there stated that (slip opinion, p. 2):

> * * * in the event that the Emergency Court had found the regulation inapplicable and such decision had been made *before a judgment* was rendered in the District Court, its ruling would be binding upon the District Court. Under § 204 (e) (2) (ii), consideration of a protest under § 203 (a)

> is not a ground for staying the proceedings in the District Court, since the protest proceeding did not precede the suit in the District Court; and under the same provisions of the Act *determination of the protest proceeding under § 203 (a) can have no retroactive effect once the District Court has entered its judgment.* But the opportunity for securing a decision from the Emergency Court through the protest proceeding *before a judgment* in the District Court is entered, has practical significance and makes this a living and not a hypothetical controversy. [Italics supplied.]

At the time the Emergency Court was asked to consider the issue of interpretation in the *Collins* case, the district court had not entered any judgment, and consequently, a final determination of that issue by the Emergency Court would have been binding upon the district court under the doctrine of *res judicata*. *United States* v. *Moser*, 266 U. S. 236; *Southern Pacific R. R.* v. *United States*, 168 U. S. 1, 48. In this case, however, the district court had entered its judgment before the Emergency Court was faced with the issue of interpretation. It would have been entirely purposeless for the Emergency Court, under these circumstances, to have gone into the question of interpretation anew, because, as this Court stated in the *Collins* case, the Emergency Court's determination "can have no retroactive effect once the District Court has entered its judgment."

This Court's statement that the Emergency Court's ruling as to applicability would have been binding upon the district court had such a decision been made "before a judgment was rendered in the District Court," necessarily recognizes that such a decision would *not* have been binding upon the district court if it had already entered its judgment.

If the Emergency Court had gone into the issue of interpretation anew and reached a conclusion contrary to that of the district court, it would not have gone into the question of the Regulation's validity. This would simply have deprived petitioner of her opportunity to get a decision on validity without helping her in the enforcement proceeding. As the Emergency Court stated (R. 47): "It is to assure a complainant in this court his right to a decision as to the validity of a regulation, that we accept the interpretation of the District Court."

The petitioner asserts that the Administrator's interpretation of the Regulation is, in effect, an order of the Administrator, becomes a part of the regulation, and that "if the Emergency Court decided that the interpretation contended for by the Administrator was invalid, it would to that extent find the Regulation as interpreted to be invalid." It concludes that "The interpretation of the Regulation, therefore, is under the exclusive jurisdiction of the Emergency Court, and it was wrong

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in renouncing its jurisdiction in favor of the District Court." (Pet. 14.) This argument is fallacious. While an administrative agency's interpretation of its own regulation is entitled to great weight, it is but an interpretation and not a retroactive amendment of the regulation. Were this not the case, there could never be an issue as to interpretation, either in the enforcement court or the Emergency Court, because the Administrator's complaint in an enforcement action would constitute an interpretative "order" and the Emergency Court alone would have jurisdiction to consider its validity. That there is a difference, however, between questions involving the construction of language of a regulation and the validity of the regulation as construed appears to be so obvious as to require no argument.

The petitioner also argues that there was no record basis for the Emergency Court's premise that the district court had decided the question of interpretation (Pet. 14–15). The record basis, however, is adequate. The petitioner stated in her complaint (R. 32) that:

> On January 3, 1946, said District Court entered judgment enjoining complainant as defendant from violating the provisions of said Revised Maximum Price Regulation No. 330, but refusing to assess damages against her.

As the Emergency Court pointed out in its opinion (R. 47–48), in issuing such an injunction, the

district court necessarily interpreted the regulation to limit the petitioner in some instances to ceiling prices at or below cost because the injunction limits petitioner to the markups set forth in her pricing chart; and the temporary injunction which appears in the record in this case supports this conclusion (R. 38–39).

The petitioner also argues that it was improper for the Emergency Court to consider and review the district court judgment since it resulted from an entirely separate proceeding (Pet. 14, *semble*). The Emergency Court did not "review" the district court judgment; it merely analyzed it to determine the litigated issues—the normal course pursued by every court in determining the applicability of the doctrine of *res judicata*.

The petitioner's final assertion on this point is that she is in "somewhat better position than the *Collins* case" (Pet. 17), since, in that case, the district court proceeding antedated the institution of the protest proceeding, whereas, in this case, the situation is reversed. Here, again, the argument completely ignores the doctrine of *res judicata*. It is not the initiation of a proceeding but its termination in a judgment that is determinative.[2]

---

[2] The fact that an appeal was pending from the judgment of the district court is irrelevant to the question of the applicability of the doctrine of *res judicata*. The district court judgment operated as a bar to the relitigation of the issue of interpretation of the Regulation. Cf. *Reed* v. *Allen*, 286 U. S. 191, 199; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 520.

2. Petitioner has not attacked the Regulation as not being generally fair and equitable. In any event, the earnings of the industry preclude such an attack (R. 26). See *Gillespie-Rogers-Pyatt Co.* v. *Bowles,* 144 F. 2d 361 (E. C. A.). Petitioner's complaint is, rather, that the Regulation placed her at a competitive disadvantage in that twenty-nine of her ninety-two base period cost price lines were frozen to unprofitable maximum selling prices (R. 28–29). The issue thus presented is whether the Regulation, undisputedly generally fair and equitable, was rendered arbitrary and capricious because of its effect on an individual seller.

The instant Regulation is of the "freeze" type which has repeatedly received judicial approval. *Chatlos* v. *Brown,* 136 F. 2d 490 (E. C. A.); *Consolidated Water Power and Paper Co.* v. *Bowles,* 146 F. 2d 492 (E. C. A.); *Hawaii Brewing Corp., Ltd.* v. *Bowles,* 148 F. 2d 846 (E. C. A). It has been recognized that such a regulation, freezing the price structure of an industry as it existed during a particular base period, may leave some individuals in less advantageous positions than others. Such regulations are not thereby rendered invalid. *Lakemore Co.* v. *Brown,* 137 F. 2d 355 (E. C. A.).

The facts in this case warrant no different conclusion. The base period of the Regulation

consists of the five months from August 1 to December 31, 1941. The maximum selling price for a cost price line is the price at which the largest number of garments in the cost price line were sold during that period by the individual seller. See Appendix B, *infra,* pp. 22, 24. It was reasonable to assume that during so lengthy a base period, including the peak of the fall selling season, a merchant's normal operations and normal markups would be reflected in the selling prices at which he sold the largest number of garments.

Petitioner's difficulty is alleged to have resulted from an extraordinary clearance sale running throughout the five months of the base period (R. 2). No suggestion has been made that the base period was unrepresentative or that it was too short. On the contrary, petitioner's objection, essentially, is that the Administrator should have so tailored the regulation as to avoid leaving any one of the many thousands of merchants subject to its control in a position of competitive disadvantage,[3] which may have resulted from the fact that the Regulation froze him to maximum prices no higher than the prices at which he elected to sell during the base period. The Emergency Price Control Act imposes no such burden

[3] Upon this record, petitioner has not demonstrated that in fact she has suffered either competitive disadvantage or hardship (R. 26, 48).

upon the Price Administrator. *United States Gypsum Co.* v. *Brown,* 137 F. 2d 803 (E. C. A.); *Pfeiffer Brewing Co.* v. *Bowles,* 146 F. 2d 1006 (E. C. A.), certiorari denied, 324 U. S. 865; *Lakemore Co.* v. *Brown, supra.*

Petitioner has cited *Consolidated Water Power and Paper Co.* v. *Bowles,* 146 F. 2d 492 (E. C. A.); *Flett* v. *Bowles,* 142 F. 2d 559 (E. C. A.) and *Hillcrest Terrace Corporation* v. *Brown,* 137 F. 2d 663 (E. C. A.) in support of her attack upon the regulation (Pet. 20). As the Emergency Court of Appeals stated (R. 48), "Though relief was granted in these cases against competitive injustices established by a regulation, the problem in each involved either a concern which appeared to be representative of a class or a regulation which itself had dealt with individual concerns. We find neither of these situations in the present case."

Petitioner argues that the absence of an adjustment provision [4] rendered the regulation arbitrary and capricious. She points to Amendment 5 to the Regulation, which afforded petitioner and others prospective relief, as demonstrating the

[4] Petitioner's reference to the adjustment provision in Maximum Price Regulation No. 580 is irrelevant. That regulation has a base period of one day which could easily fail to reflect a seller's historical practice. There is thus no basis for comparison of that Regulation with Maximum Price Regulation No. 330, which has a five month base period.

feasibility of making similar provisions *ab initio*.[5] It is submitted that a complete answer to this contention was made by the Emergency Court of Appeals (R. 48):

> This contention ignores the changing conditions of our economy and fails to recognize the purpose of the protest procedure provided by the Emergency Price Control Act. This Act recognizes the difficulties confronting the Administrator in times of threatened inflation and does not require of him superhuman foresight. We think it may be agreed that if a regulation appears on its face to create a situation which reasonably will be expected to impose hardships upon an industry, the Administrator will be found to have acted arbitrarily and capriciously and the regulation held invalid. But on the other hand, if the regulation on its face appears fair, it is not to be held invalid simply because it eventuates, upon further consideration, that some in an industry were found to have suffered hardships. One of the reasons for granting the right to file protest proceedings before the Administrator was to give opportunity to

[5] The fact is that, upon consideration of petitioner's protest, the Administrator caused a general survey to be instituted (R. 26). This revealed that some merchants were dropping cost lines having unsatisfactory markups. To remove this impediment to distribution, an escape was provided from unprofitable markups. See Statement of Considerations Accompanying Amendment 5 to Maximum Price Regulation No. 330, Appendix B, *infra*, pp. 24–26.

> the Administrator to reexamine a regulation with a view of determining whether it should be amended so as to deal more equitably in the future. It was not expected that amendments would operate retroactively or that they would be held to establish or admit invalidity of the original regulation.

Under all the circumstances it is submitted that the Emergency Court of Appeals was correct in determining that there was "nothing arbitrary or capricious in the Regulation as originally drawn." (R. 48.)

CONCLUSION

The decision below is correct, and there is no warrant for further review. The petition, therefore, should be denied.

Respectfully submitted.

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NOVEMBER 1946.

APPENDIX A

The pertinent provisions of the Emergency Price Control Act, 56 Stat. 23, 50 U. S. C. App., Supp. V, 901, *et seq.*, are as follows:

REVIEW

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such com-

plaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the

Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(e) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. *Two judges shall constitute a quorum of the court and of each dicision thereof.*[1] The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of

[1] Added by sec. 107 (a) of the Stabilization Extension Act of 1944.

cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation, or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision

of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e)[2] (1) *Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205* ***of this Act or section 37 of the Criminal Code,***[3] *involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated* ***or conspired to violate.***[3] *The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of*

[2] Entire subsec. (e) added by sec. 107 (b) of the Stabilization Extension Act of 1944.

[3] Added by sec. 6 of Pub. Law 108, 79th Cong., 1st sess. (1945).

the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 ***of this Act or section 37 of the Criminal Code,***[4] *involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—*

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 ***of this Act or section 37 of the Criminal Code,***[4] *setting forth objections to the validity of such provision which the court finds to have been made in good faith; and*

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the

[4] Added by sec. 6 of Pub. Law 108, 79th Cong., 1st sess. (1945).

time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 **of this Act or section 37 of the Criminal Code;**[5] *nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.*

[5] Added by sec. 6 of Pub. Law 108, 79th Cong., 1st sess. (1945).

APPENDIX B

Revised Maximum Price Regulation 330, issued on September 13, 1944, provides in relevant part as follows (9 F. R. 11350):

> SEC. 2. *How to find your ceiling prices under this regulation*—(a) *Explanation of rules.* You find your ceiling price under this regulation by calculating the markup which you took on garments you delivered during the "base period", and then applying that markup to the cost of the garments you are pricing. You find what the "base period" markup is by using one of the pricing rules which are given in section 4.
>
> * * * * *
>
> (c) *What is the "base period."* The base period is very important because you must figure your mark-up from your deliveries of garments during that period.
>
> (1) *For sales of toddlers' garments, or blouses under size 30, or slacks and slack suits.* (i) The "base period" for all garments in categories 5a, 10a, 15a, 20a, 25a, 26a, 26b, and 32–39 is the period between August 1 and December 31, 1942 for retailers and the period between July 1 and October 31, 1942 for wholesalers.
>
> * * * * *
>
> (2) *For sales of garments in all other categories.* (i) The "base period" for retailers is the period between August 1 and December 31, 1941; for wholesalers, it is

the period between July 1 and October 31, 1941.

* * * * *

SEC. 3. *Pricing charts.* * * * On or before October 15, 1944, every seller subject to this regulation (except sellers who apply under section 5 and sellers who are members of chains which have received orders authorizing uniform pricing from the OPA), must file two signed copies of a pricing chart with the Office of Price Administration at the district office having jurisdiction over the area in which the seller is located. You must keep a copy of the pricing chart for your own use. On and after November 15, 1944, you may not sell or deliver any garments subject to this regulation unless you have received an acknowledgment from the OPA of the filing of your pricing chart as required by this section.

(a) *How to prepare a pricing chart.* Each pricing chart must contain the following:

* * * * *

(4) A list of the categories you delivered during your base period.

(5) A list of the cost prices at which you purchased garments in each of these categories. You must indicate whether this is a unit or dozen price. If you intend to use the exception provided in Rule 1 (section 4 (b) (1)) for any cost prices, such cost prices on your pricing chart should be preceded by the symbol "S".

(6) The discount, terms or allowance at which you purchased the largest number of garments at each cost price listed in (5). (Wholesalers must also include the dis-

counts, terms and allowances on which they customarily sold.)

(7) The selling price at which you delivered, during the base period, the largest number of garments of each cost price listed in (5). If during the base period you delivered an equal number of garments at two or more different selling prices, list the lowest of these selling prices. (Wholesalers must indicate whether this is a unit or dozen price.)

SEC. 4 *Pricing rules*—* * *

(6) *Pricing Rules for garments of a category listed on the seller's pricing chart.* * * *

(1) *Rule 1. Garments purchased at a cost price listed on the seller's pricing chart.* The ceiling price for a garment which has a cost to you the same as a cost price listed for that category on your pricing chart is the selling price listed for that cost price on your chart.

* * * * *

STATEMENT OF CONSIDERATIONS INVOLVED IN THE ISSUANCE OF AMENDMENT NO. 5 TO RMPR 330

Revised Maximum Price Regulation 330 offers no mechanism whereby abnormally low mark-ups on retail charts can be revised. Originally it was deemed unnecessary to provide such relief in view of the long base period and the use of the largest volume of sales of a particular cost line as the determinate of the ceiling price.

In practice, the long base period has served to protect most distributors in their normal mark-ups while at the same time protecting consumers from the inflationary effects which would have occurred had retailers been allowed to use

their initial offering price on each cost line as the determinate of the proper ceiling price.

In certain exceptional cases, the regulation has resulted in freezing extremely low selling prices for certain cost lines and has resulted in these retailers being unable to purchase merchandise from manufacturers because of the "clearance sale" retail price which these retailers would have to use.

The present amendment is designed to remedy this situation by allowing retailers whose charts showed mark-ups 20 or more percentage points below a category average specially computed for the purpose to cross out the selling prices having those mark-ups and to insert selling prices based on the mark-up for the nearest cost line in Table A (Section 5 of the Regulation) opposite the proper cost lines. A nation-wide survey of the RMPR 330 charts filed by retailers with OPA District Offices was conducted to determine whether abnormally low mark-ups could be defined clearly and whether retailers could be provided relief from these low mark-ups without inflating the general level of prices. The results of the survey showed quite clearly that abnormally low mark-ups fell more than 20 percentage points below average category mark-ups and that the 20 percentage point figure could be used as a clear line of demarcation. The survey also showed that the number of stores and the number of cost lines involved in these abnormally low mark-up relationships was sufficiently small to preclude any possibility of a general price rise resulting from the action taken in this amendment. Available trade information showed

that merchandise was not being sold at these mark-ups since retailers affected had dropped purchases of those cost lines. Therefore, the increase in retail prices permitted here cannot be considered as raising actual selling prices of merchandise on the market.

The permission to use Table A mark-ups in place of the abnormally low mark-ups will allow retailers affected to resume purchases of merchandise, since Table A embodies standard cost price line relationships at which manufacturers will sell merchandise to retailers for resale. While these mark-ups may not be as high as mark-ups previously enjoyed by the retailers affected by the action, the mark-ups are standard mark-ups.

However, to prevent a retailer who customarily sold below Table A prices from getting a mark-up out-of-line with his own chart, the amendment also provides that the OPA may reduce the Table A mark-up in such cases.

Issued this 11th day of April 1946.

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Administrator.

U. S. GOVERNMENT PRINTING OFFICE: 1946